United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1448

To be argued by
EUGENE NEAL KAPLAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1448

UNITED STATES OF AMERICA,

Appellee,

—v.—

SUSAN M. BRAUNIG,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Susan M. Braunig appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on October 26, 1976, following a two-week trial before the Honorable Lawrence W. Pierce, United States District Judge, and a jury.

Indictment 76 Cr. 21, filed January 9, 1976, charged Braunig with thirteen counts of participation in a series of interrelated fraudulent schemes between 1973 and 1976, in violation of the federal laws prohibiting mail fraud, wire fraud, travel fraud, fraudulent use of fictitious names and titles, and aiding and abetting such frauds (respectively, Sections 1341, 1343, 2314, 1342 and 2 of Title 18, United States Code), as well as with two

counts of perjury before the Grand Jury, in violation of Section 1623 of Title 18, United States Code.*

Trial against Braunig commenced on September 13, 1976. Prior to the presentation of any proof, the District Court granted the Government's motion to sever nine of the fifteen counts in which Braunig was named (Counts 1-4, 9-12 and 16) (Tr. 2).** The trial proceeded

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* The indictment also named two co-defendants, Michael S. Gardner (Counts 1-13) and Sy Yoakum Guthrie III (Counts 7-12 and 14). Gardner and Guthrie were tried on this indictment in April and May 1976, but the trial of defendant Braunig was severed after she fled to Canada (in violation of her bail limits) and was arrested there in the act of executing a check-kiting scheme. Following her conviction in Canada and the service of several months imprisonment there, she was returned to this District to face the instant charges.

Meantime, Gardner was convicted of all thirteen fraud counts charged against him and was sentenced to a term of five years in custody by Judge Pierce. His conviction was affirmed by this Court, without opinion, on October 22, 1976. *United States* v. *Michael S. Gardner*, Dkt. No. 76-1339 (2d Cir., Oct. 22, 1976), *petition for cert. pending*, Dkt. No. 76-5727. Guthrie was tried on the six fraud counts in which he was named (Counts 7-12) and was acquitted; a perjury count charged against him (Count 14) was severed by Judge Pierce. Disposition of that count was adjourned pending the resolution of a separate indictment, 76 Cr. 349 (S.D.N.Y.), in which Guthrie is named. On November 30, 1976, Guthrie was found guilty by a jury of the five counts of wire fraud charged in that Indictment which related to certain "advance fee" insurance bond swindles. He was sentenced by United States District Judge Dudley Bonsal on January 11, 1977, to a term of two years' confinement. Consequently, a *nolle prosequi* has been filed with respect to the open perjury count against Guthrie on this indictment.

** Abbreviations used in this brief are as follows: "Tr." refers to the trial transcript; "App. Br." refers to appellant's brief; "GX" refers to Government exhibits at trial; "DX" refers to defendant's exhibits at trial; and "A." refers to appellant's Appendix.

with respect to Counts 5 and 6, charging Braunig with participating with her co-defendant Gardner in a "fraudulent check" scheme to defraud Barclays Bank of New York of almost $10,000; Counts 7 and 8, charging Braunig, together with co-defendants Gardner and Guthrie, with committing an "advance fee" swindle of a wholesale travel agency named Fun Tyme Packages; Count 13, charging Braunig and Gardner with committing a fraudulent "charge account" scheme where, employing false and fictitious names and titles, they opened numerous credit accounts and ran up large bills that, in material measure, they never intended to pay and never did pay; and, finally, Count 15, charging Braunig with making numerous false material declarations to the Grand Jury. On September 24, 1976, the jury returned a verdict against Braunig of guilty on Counts 13 and 15 (the "charge account" fraud and perjury counts). Thereafter, on September 27, 1976, the jury found Braunig guilty on Counts 5 and 6 (the Barclay's Bank fraud counts) and not guilty on Counts 7 and 8 (the Fun Tyme "advance fee" counts).

On October 26, 1976, Judge Pierce sentenced Braunig to a concurrent term of two years on each of the counts on which she had been found guilty.* The defendant is presently serving her sentence.**

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* Following the imposition of sentence, the Government consented to the dismissal of the nine counts which had been severed by the District Court prior to trial (Tr. 1290).

** In view of Braunig's previous flagrant disregard of her bail limits, which resulted in her arrest and conviction in Canada for criminal check-kiting, she was remanded following the trial of this case. This decision was affirmed by this Court, without opinion, on October 19, 1976. *United States* v. *Susan Braunig*, Dkt No. 76-1448 (2d Cir., Oct. 19, 1976).

Statement of Facts

The Government's Case

The Government's case, consisting of 29 witnesses and over a hundred exhibits, overwhelmingly established that Susan Braunig had committed the frauds charged in Counts 5, 6 and 13 of the Indictment, as well as perjury before the Grand Jury (Count 15). In view of the fact that on this appeal Braunig, although "stating" the facts as if the jury had accepted, rather than rejected, her defense, does not challenge the sufficiency of the evidence against her * and that the appellate points she has endeavored to raise do not relate to the facts in chief, the Government's proof is reviewed below in somewhat summary fashion.**

A. The Barclay's Bank Fraud (Counts 5 and 6).***

Perhaps the most blatant scheme charged in the Indictment was the forged and fraudulent check scheme that Braunig and Gardner committed at the expense of

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* Of course, on appeal the evidence should be viewed in a light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60 (1942).

** However, in view of Braunig's contention that admission of the apartment search materials at trial (discussed *infra*) cannot be considered as harmless error (App. Br. 24-28), assuming *arguendo* that their admission was erroneous, we present a more than bare-bones analysis of the overwhelming proof against her.

*** In proving this fraud, the Government's direct case consisted principally of the testimony of Fortune, Naim (Tr. 114-97); Leon Wiecerzak (Tr. 198-208); Ivan Svendsen (Tr. 209-35); Emil Raimondi (Tr. 256-63); Donald Stangel (776-91); Thomas Myers (Tr. 852-84); and Erick Vail (Tr. 890-96), and the exhibits accompanying their testimony.

Barclay's Bank of New York (Counts 5 and 6). In June 1974, Barclay's opened a new branch in mid-town New York and offered free checking accounts to new customers (Tr. 115-16). In short order, Braunig (and Gardner) opened three accounts at the branch: one in her name, one under the fictitious name "S. M. Gardner," * and one under the name of their corporate shell "Ekalb Investments, Inc.," which they represented as being an "investment" company presided over by "S. Michael Gardner" and Susan Braunig (Tr. 116-21; GX 265-268).

Over the next few months, Gardner and Braunig "tested the waters" by drawing a number of insufficient checks on the "Ekalb" and the "S. M. Gardner" accounts. As a result, they quickly discovered that Barclay's was lax and error-prone in its check-clearing procedures, particularly where foreign transactions were involved; and they took advantage of this fraudulently to obtain monies through both of these accounts.**

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* The fictitious name "S.M Gardner," which Gardner and Braunig used jointly and severally to commit their various frauds, represented an amalgam of her first two initials ("Susan Margaret") and his last name.

** For example, in August 1974, having $194 in their Ekalb account, Gardner made out an Ekalb check for $22,860 to Hermance Investments in Switzerland. The check "bounced." Unfazed, in September 1974, with the same low balance in the Ekalb account, Gardner made out another check to Hermance Investments, this one for $23,437. Through an error at Barclay's, this check initially cleared, and Barclay's appeared to have lost over $23,000. Fortunately for Barclay's, before the money had reached "Hermance Investments," Barclay's was able to stop the transfer and recoup the money from the transferring Swiss Bank, Credit Suisse (Tr. 128-31; GX 274).

Later in September, Gardner drew a certified check for $5,000 on his S.M. Gardner account at a time when he had a sufficient balance to cover it. But when, upon receiving his next statement, he found that, again through some bank error, this

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With this as background, Braunig and Gardner, in December 1974, turned their attention to the remaining Barclay's account, in Ms. Braunig's name.

Gardner proceeded to make out two blank checks of the Metropolitan Trust Company (a bank-like institution in Canada), for just under $5,000 each, to the order of Susan M. Braunig, using fictitious account numbers and names. On the first check (GX 56A), dated December 3, 1974, he forged the name "John Robert Barry" and on the second check (GX 56B), dated December 4, 1974, he forged the name "David Barrett." * Braunig then deposited these fraudulent checks, on consecutive days, into her Barclay's account,

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withdrawal of $5,000 had not been debited to the S. M. Gardner account, he immediately drew out the balance of the artificially inflated account, thus defrauding the bank of $5,000. When, in November, the bank discovered the error, attempts to communicate with "S.M. Gardner" and Ms. Braunig proved unsuccessful. (Tr. 139-40; GX 270, 273, 555A).

There is ample evidence to connect Braunig with the fraudulent activities in these other Barclays' accounts. For example, Braunig was a signatory on the Ekalb account (GX 267-68); Braunig went to Barclay's Bank on numerous occasions to make inquiries concerning these accounts (e.g. Tr. 131-33, 194-95); she had personal and telephone conversations with personnel at the bank concerning the accounts and checks referred to above (Tr. 154-55; GX 555A and 556A); and, as Gardner's secretary, business associate and romantic liaison she was generally aware of all that was going on with both his individual and "corporate" affairs, including correspondence received from banks, such as Barclays (Tr. 80-81, 113, 986).

* The proof that Gardner forged these two checks was overwhelming, as argued by the Government in summation, e.g. Tr. 1066-70, so much so that it was not disputed by the defense in summation (Tr. 1129) and is not contested on this appeal (App. Br. 3). For this reason, no need is served by reviewing the clear proof of this forgery.

the prior balance of which was near zero (Tr. 147-52; GX 56A & B, 269, 272).*

Once these two Canadian checks were deposited into the Braunig account, Braunig and Gardner knew that there would be a considerable delay while these checks cleared through the international mails between New York and Canada. They knew further that Barclay's was lax and error-prone, and if it erroneously credited, or could be induced to credit, the proceeds of the checks any time during the lengthy clearing-period delay, Braunig and Gardner could reap the fruits of this fraud.**

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* While the defense did not contest the forgery of these two checks, in the trial court it hotly challenged Ms. Braunig's knowledge of their fraudulent character. However, proof of such knowledge both by direct and circumstantial means, is equally overwhelmingly evidenced in the record: Apart from the proof of Ms. Braunig's fraudulent check-kiting activities in Canada in March, 1976 (Tr. 429-71; GX 407-410-1,461-67, 471-72), and her conduct viz-a-viz the State Bank of Albany phony certification stamp (discussed *infra*), the internal evidence on the checks themselves (the names, amounts, dates and misspellings) (GX 56A and 56B), Braunig's repeated solicitations to the bank to credit the forged checks (Tr. 153-56), the rapid withdrawal of funds from the Barclay's account by Braunig and her transfer of these funds to the "S.M. Gardner" account at Amalgamated Bank as soon as she was able to do so (Tr. 256-63; 152-59; GX 269A; 272 I-M; 600A), the telephone logs which she prepared reflecting her dealings with Barclay's and how she was avoiding calls from that bank (GX 555A and 556A), and her possession of blank Metropolitan Trust checks identical to those used to prepare the two forged checks (GX 450-51), when taken together with the exceptionally close relationship that she shared with Gardner during the entire course of their conspiratorial relationship, both individually and collectively evidence her knowledge of these forgeries beyond a reasonable doubt.

** In particular, there was ample proof that Gardner and Braunig knew that Barclay's Bank, like other New York Banks, had a "three day rule" and a "seven day rule' '(Tr. 157A; GX 409 and 556A). When a check drawn on a local New York

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Accordingly, on December 6, just 3 business days after the deposit of the first forged check, Braunig went to Barclay's and tried, with two tellers, to cash a check for $3,000 against the proceeds of the first forged check. No error had yet been made, however, nor was she able to induce one on this occasion, either directly or by the subsequent deposit of this check elsewhere (Tr. 153-55; GX 269A; 272E and F). So Braunig waited again, until seven calendar days had passed, and on December 10 tried to cash a $1250 check at Barclay's (Tr. 155-56; GX 269A); but Barclay's computes its "seven day rule" by business days, so once again she was unsuccessful.*

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bank was deposited into Barclay's Bank of New York, Barclay's would automatically credit the proceeds after three days unless the check had been reported bad. Likewise, if the check was drawn on an out-of-town (but not foreign) bank, Barclay's would automatically credit the proceeds after seven days unless the check had been reported bad. In the case of foreign (including Canadian) checks, however, there was no automatic rule, and the bank was not supposed to credit the proceeds until receiving actual word of clearing from the foreign bank. But Braunig and Gardner knew that if the bank could be induced to make one of its frequent errors and credit the checks under either of the automatic rules, there would be ample opportunity to realize the fraud.

* Again, Braunig attempted to clear this check through another bank, just as she had done with the earlier one (Tr. 155-56; GX 269A; 272 G and H). A Barclay's employee, Mrs. Naim, testified that on both of these occasions, when she asked Braunig (who was trying to induce Mrs. Naim to credit the check) where the checks were drawn on, Braunig purported to be unable to remember whether these two large checks, which were her only deposits of any size throughout this period, were drawn on a local or out-of-town bank (Tr. 184ff). Likewise, Braunig, in her telephone log of December 9, 1974 (GX 556A) reported back to Gardner that "They [Barclay's] couldn't tell from looking at the account where the deposit was drawn on." This, of course, is further circumstantial evidence of Braunig's knowledge of the fraudulent nature of these two checks.

On December 12—seven business days after deposit of the first forged check—Braunig tried a third time with a small $75 check (Tr. 975; GX 269, 272). This time she was successful in inducing an error: a bank employee treated the deposits under the "seven day rule" and credited them to Braunig's account (Tr. 156-58).

Within five days, Braunig proceeded to withdraw the entire proceeds (other than $10.80); in turn, she converted some of the proceeds to cash, but deposited most of them into an "S.M. Gardner" account at the Amalgamated Bank, from where she and Gardner spent it on personal uses (Tr. 158-59; GX 272I-M; 410(1); 600) and also on paying the fee of the attorney who represented them when Barclay's thereafter sued them. Meanwhile, the forged Canadian checks wound their way through the mails (Tr. 165-66, 202; GX 248; 250 and 250A), and in January and February, Barclay's received word that they had failed to clear. By then it was too late: Braunig and Gardner were $10,000 richer, Barclay's $10,000 poorer.*

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* In Point V of her brief, Braunig raises, but does not argue, the issue of whether *United States* v. *Maze*, 414 U.S. 395 (1974), precludes the mail fraud statute from being applicable to the forged check fraud charged in Counts 5 and 6. This claim was fully briefed in Gardner's appeal and rejected by this Court there. In this regard, it is to be noted that, unlike Gardner, Braunig did not move on this ground for a dismissal of these counts in the District Court and thus has waived the issue on this appeal. Fed. R. Crim. P. 12(f). Even if Braunig has preserved this issue for review, then, given the purely technical fashion in which it is raised here and in light of the fact that she received concurrent two year sentences on all of the counts of which she was convicted and not just on the counts to which the *Maze* challenge applies, review of the *Maze* issue in the present context is not warranted. *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16

[Footnote continued on following page]

B. The Charge Accounts Fraud (Count 13).*

Beginning in late 1972, shortly after Braunig and Gardner had formed their liaison, these defendants entered into a scheme whereby Braunig fraudulently obtained charge accounts, credit cards, and the like using her own name but a wide variety of fictitious titles and false employment information drawn from the various corporate fronts that she and Gardner had developed. After establishing a large number of such accounts,** Braunig, by pretending to have married a rich executive named "S. Michael Gardner," induced the companies to change her

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(1973); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *United States* v. *LaVecchia*, 513 F.2d 1210, 1219 (2d Cir. 1975). Moreover, the affirmance by this Court of Gardner's conviction, *United States* v. *Gardner*, Dkt. No. 76-1339 (2 Cir., Oct. 22, 1976), after full briefing on the merits of this point, see Government's Brief in *United States* v. *Gardner*, Dkt. No. 76-1339, should stand as law of this case for purposes of the present appeal. Cf. Rule 0.23 of the Rules of the United States Court of Appeals for the Second Circuit. Thus, we do not present argument on this point.

* The Government's direct case on the charge accounts fraud consisted mainly of the testimony of Deborah Menendez (Tr. 73-113); Verna Mott (Tr. 235-43); Peter Altmann (Tr. 494-508); Frank Finnegan (Tr. 512-39); Maureen Walsh (Tr. 539-45); Neil Cirranello (Tr. 545-52); Larry Schwartz (Tr. 553-59); Marie Sansone (Tr. 562-70); Marshal Arfin (Tr. 584-90); Patrick Raftery (Tr. 594-602); Joel Viders (Tr. 602-08); and Karen Schiller (Tr. 610-20).

** The proof showed that Braunig and Gardner initially made small payments on these accounts. As the Government argued to the jury, the proof demonstrated that the purposes of these early payments were to lull these credit cards issuers along (Tr. 1064); to get the issuers to increase their credit limits; and to allow more accounts to be opened using the earlier ones as references (Tr. 1090-91). Obviously, if they had defaulted on the initial accounts, their subsequent and greater frauds would not have been possible.

accounts to joint ones in the common fictitious name of "S. M. Gardner" (i.e. "S. Michael Gardner" and "Susan M. Gardner") and, in many cases, to increase their credit limits. She and Gardner then ran up, in 1974 and 1975, thousands of dollars in unpaid charges, made use of their false names to stave off collection, and, when all else failed, simply defaulted, leaving it to the companies to discover that the credit information on which they had relied in extending credit to Braunig and "S. M. Gardner" was entirely false.

The Government introduced numerous examples of such fraudulently obtained charge accounts, any one of which was sufficient to support conviction on Count Thirteen, which charged Braunig with using false and assumed names and titles for the purpose of carrying on a fraudulent scheme to obtain credit, in violation of 18 U.S.C. §§ 1342 and 2.* The example of the Master Charge account (GX 205) is illustrative and is set out in the margin.**

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* The primary examples were charge accounts with Altman's (GX 226), Bank Americard (GX 235), Bloomingdale's (GX 227), Bonwit Teller (GX 222), Lane Bryant (GX 233), Master Charge (GX 205), Saks Fifth Avenue (GX 228), Tiffany's (GX 234), and Korvette's (GX 229).

** Braunig first applied for a Master Charge account in February 1973, under her real name and home address, but falsely stating among other things that she had been employed for the past four years at "Worldwide Securities Ltd.", a "brokerage" business where she was "Adm. Asst. to President" (employee number "04510") at an annual salary of "$10,400", plus additional income from "stock portfolio" and "commodities contracts" (GX 205A).

(In actual fact, "Worldwide Securities" was merely a front for Gardner and Braunig. Far from working there for four years, Braunig had only met Gardner in 1972 (Tr. 691). There were no employee numbers at "Worldwide Securities," which consisted entirely of Gardner, Braunig, and an occasional part-time secretary

[Footnote continued on following page]

(Tr. 612), and Gardner did not pay Braunig a regular salary (Tr. 614-15, 693-94). Additionally, the Master Charge records indicate that when their office called the phone number Braunig had given for Worldwide Securities, someone purporting to be a "Mrs. Seidenberg" confirmed Braunig's employment information. In actual fact, the real Karen Seidenberg, a temporary secretary, had left Gardner's employ months earlier (Tr. 613); Braunig had simply appropriated her name, just as she had done in at least three other instances relating to credit card applications (Tr. 613-16)).

Having opened the account, Braunig, in line with the pattern on all her accounts, further lulled Master Charge into believing she was a good credit risk by, over the first few months of the account, limiting her charges and making timely payments. Then, in February 1974, she took the next step in the scheme by sending Master Charge an application to change her account cards to the joint name "S. M. Gardner." In this application, in addition to assuming the false name, she falsely stated among other things that she was now employed, at an annual salary of "$16,000," at "Penquin Products Company," a "Conglomerate" that had taken over Worldwide Securities, and that she was now "married" to "S. Michael Gardner," for whom she wanted the second credit card (GX 205B). (In actuality, she was not married to Gardner or anyone else (Tr. 716; 1014; 10039), and Penquin Products was simply a defunct partnership that she and Gardner had set up purportedly to market complimentary dinner club coupons and that had never gotten off the ground (Tr. 701; 714-16).) As soon as the new cards were issued, Gardner and Braunig both incurred charges.

Finally, on May 1, 1974, Braunig applied for an increased credit limit for "S. M. Gardner," stating "want to use card for travel expenses now as well (business) company re-imburses expenses." On this application under the name of employer or business, Braunig put "Ekalb Investment Inc.," one of the "shell" corporations that she and Gardner had set up (Tr. 709-10). Braunig falsely stated that Elkalb was a "Conglomerate," of which her husband was President at a salary of more than "$100,000" and of which she was "Corporate Secretary & Mgr." at a salary of more than "$16,500" (GX 205C).

In early July, Master Charge approved the increased credit limit. As reflected in the voluminous Master Charge records (GX 205), Braunig, a few days later, called Master Charge and falsely claimed that her credit card had been lost or stolen. She

[Footnote continued on following page]

Ms. Braunig's fraudulent shenanigans with respect to her other credit accounts were similar and resulted in her and Gardner securing over $11,000 in unrepaid credit.

C. Ms. Braunig's Perjury (Count 15).*

Count 15 of the Indictment charged Braunig with making numerous false material declarations to the Grand Jury, during her testimony on June 20, 1975, primarily concerning her "business" activities with Gardner and her adoption and subsequent use of the fictitious "S. M. Gardner" name.** While "proof of any of the specifications [was] sufficient to support a verdict of guilty," *United States* v. *Bonacorsa*, 528 F.2d 1218, 1222 (2d Cir.), *cert. denied*, — U.S. — (1976), the proof at trial overwhelmingly demonstrated the perjurious nature of every specification, and its sufficiency is not challenged here.

For example, in an attempt to explain away her repeated use of the fictitious name "S. M. Gardner" (which she employed in fraudulently obtaining credit,

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requested Master Charge to issue two new cards, under a new account number, to "S. M. Gardner", and this was done.

Armed now with two "S. M. Gardner" Master Charge cards each, Gardner and Braunig, beginning in August 1974, quickly ran up approximately $3,500 in charges, $3,300 of which they never paid (GX 205D).

* In proving Ms. Braunig's perjury before the Grand Jury, the Government's direct case consisted mainly of the testimony of Deborah Menendez (Tr. 73-113); Fortunee Naim (Tr. 114-197); Emil Raimondi (Tr. 256-263); Sara Giamo (Tr. 713-737); Nathaniel Singleton (Tr. 738-754); Carolee Wynne (Tr. 792-817); Jed S. Rakoff (Tr. 818-832); Thomas Myers (Tr. 852-884); and Erick Vail (Tr. 890-896) and the exhibits accompanying their testimony.

** Judge Pierce found Ms. Braunig's perjurious testimony to be material to the Grand Jury's inquiry (Tr. 835-37; 842-43) and that legal ruling is not challenged on this appeal.

funneling proceeds of frauds and so forth), Braunig testified that it was her "stage name" and that she had registered it with the Actor's Equity Association in 1973 (Tr. 673ff.). At trial, however, the Government proved that Braunig's only active association with Actor's Equity was in 1969 (long before she met Gardner) under her real name, that she never changed her name to "S. M. Gardner" or anything else, and that the procedures that she testified to having followed to effect the name change were entirely dissimilar from those actually employed by Actor's Equity (Tr. 803ff; GX 350 and 351).

The list of falsehoods that Braunig recited to the Grand Jury is lengthy; suffice it to say that Braunig told one lie after another in a desperate attempt to lead the Grand Jury's eyes astray from the true facts, which would clearly have revealed both Gardner's and her own many frauds.

The Defendant's Case

Braunig called six brief witnesses,* none of whose testimony relates to the issues raised on this appeal.

ARGUMENT

POINT I

The Search Conducted at Braunig's Former Residence Was Lawful, And No Hearing Was Required.

Almost the entirety of Braunig's brief is devoted to raising certain challenges concerning a search that was

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* Patrick Carr (Tr. 940-78); Edward Earle (Tr. 979-87); Carl York (Tr. 988-98); Morton Berger (Tr. 1007-15); Myron Chefetz (Tr. 1017-22); and Peter Vogelson (Tr. 1037-40).

conducted at Braunig's former residence, Apartment 10A, 530 East 72nd Street, New York, New York, and certain items that were seized during that search and later admitted into evidence at trial. Each of these arguments is meritless. Indeed, it is only by giving a totally distorted account of the proceedings in the trial court, rife with mischaracterizations, conclusory statements and speculations having no support in the record, that Braunig is able to advance the arguments that she does and, even then, she remains unable to escape from the clear waiver of these precise issues in the District Court.

The facts relative to the search that occurred at Braunig's former residence on May 25, 1976 were not disputed in the District Court * and were stated by Judge Pierce (in his opinion denying Braunig's motion to suppress the items seized) in the following terms:

> In March 1974, defendant and one Michael Gardner, a co-defendant in this action, sublet the apartment in question ** from Ms. Kathleen Flanagan, owner and landlady. In the course of the Government's investigation of this matter, a Special Agent of the Federal Bureau of Investigation (FBI)*** learned of Ms. Flanagan and had a number of conversations with her in 1975 and 1976.
>
> By May of 1975, Michael Gardner had been imprisoned on certain federal sentences. In March 1976, Ms. Flanagan commenced eviction proceedings against the defendant and Gardner for non-

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* See discussion *infra* pp. 19-21 and 33-34.

** Apartment 10A, 530 East 72nd Street, New York, New York.

*** Specal Agent Thomas C. Myers, the case agent assigned to this prosecution.

payment of rent.* However, this proceeding was terminated when, on March 10, 1976, defendant tendered payment of back rent due.** However, by March 12, 1976, defendant Braunig had been arrested in Montreal, Canada, for certain alleged crimes committed in that city and outside the bail limits set for her by this Court on the instant indictment. While defendant was in Canadian custody, and following the issuance by this Court of a bench warrant for the defendant's arrest following her failure to appear on the scheduled trial date, the rent for the apartment again fell into arrears. On April 20, 1976, Ms. Flanagan again commenced eviction proceedings against the defendant and Gardner in the Civil Court of the City of New York. Service of process in this civil proceeding was effected pursuant to N.Y. R.P.A.P.L. § 735 ("nail and mail"). On May 7, 1976, the defendants having defaulted, the Civil Court entered a final judgment of eviction in favor of Ms. Flanagan.

The Government, and specifically the FBI, *subsequently was informed by Ms. Flanagan that she intended to take possession of the premises.****

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* The lease of Gardner and Braunig for this apartment, which had been taken in the names of "Mr. and Mrs. Gardner", had also, by this time, expired and they were, therefore, so called "month to month" or holdover tenants.

** Ms. Braunig made payment of this $3125.00 back rent by means of certain Canadian bank money orders which she had procured as the product of the check-kiting fraud which she was then in the process of committing (and for which she was ultimately convicted upon her plea of guilty) in Montreal, Canada. (Tr. 429-70; GX 471, 472, and 523).

*** Special Agent Myers was telephoned by Ms. Flanagan and informed of this *after* the entry of the eviction judgment, and, indeed, just prior to her taking possession. Yet Braunig's brief,

[Footnote continued on following page]

> On May 25, 1976, while the jury was deliberating in the case of *United States* v. *Michael Gardner*, Ms. Flanagan, accompanied by a City Marshal and an FBI agent [Special Agent Myers], executed the judgment of eviction and retook possession of the apartment. Thereupon, Ms. Flanagan consented to a search of the apartment by the FBI [Special Agent Myers]. As a result of the search, the FBI agent took possession of several hundred documents and other items. Following the FBI search, Ms. Flanagan came upon the defendant's diary, and delivered that item to FBI headquarters. The items were then delivered into the custody of the prosecutor" (A. 83-85) (emphasis added).

Based upon these undisputed (indeed, stipulated) facts, the District Judge went on to consider the legal issues and, after engaging in a characteristically thor-

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seeking desperately on appeal to invest Ms. Flanagan's private (and proper) actions with some aura of official misconduct, contends, in words underscored in her brief, that (at some unspecified time in this period) Special Agent Myers *"knew, moreover, that Mrs. Flanagan had not given notice of the eviction to Braunig and Gardner and that they did not even know about the eviction"* (App. Br. 7). While the use of underscoring might well constitute effective advocacy, the underscored sentence here employed by defense counsel, without any transcript reference or other citation of factual authority, is no more than wishful thinking. Indeed, the record does not even show that Gardner and Braunig lacked actual knowledge of the eviction (quite the contrary, as shown below), let alone that Myers was aware of their alleged lack of knowledge. And as for information received from Ms. Flanagan or her attorney, while, concededly, Myers and Ms. Flanagan had spoken prior to the time of her repossessing the property (though nothing like the frequent, repeated communications alleged in Braunig's brief), there is nothing in the record that would suggest that in any of these conversations Myers was informed of, let alone consulted about, Flanagan's pending eviction proceedings.

ough and reasoned analysis, concluded that the search conducted by Agent Myers was lawful. This ruling is correct.

A. Braunig's present challenge to the constitutionality of the underlying judgment of eviction has been waived.

On this appeal, Braunig, for the first time, challenges the constitutional validity of the judgment of eviction underlying the consent search. The essence of this claim is that, notwithstanding Ms. Flanagan's compliance with Section 735 of the New York Real Property Actions and Proceedings Law (N.Y.R.P.A.P.L.) which permitted "nail and mail" service of process in these circumstances,* the form of notice employed by the landlady was not "reasonably calculated, under all of the circumstances, to apprise [Braunig] of the pendency of the action and afford [her] an opportunity" to be heard. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As developed below, the notice was reasonable; even if it were not, the repossession by Flanagan was still proper; and even if both were improper, such improprieties by a private citizen would not lead to any exclusion of the evidence here introduced. But all this aside, there is a simple answer

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* Section 735 of the N.Y.P.R.A.P.L. dictates service of process in summary eviction proceedings as follows:

> "Service of the notice of petition and petition shall be made . . . of admittance cannot be obtained and [a suitable] person found, by affixing a copy of the notice and petition upon a conspicuous part of the property sought to be recovered; and in addition, within one day after . . . such affixing, by mailing [such notice and petition] to the respondent by registered or certified mail. . . ."

Even on appeal, defendant does not dispute that notice in accordance with this provision of § 735 was accomplished in this case.

to Braunig's claim, and that is that, not having challenged the underlying validity of the eviction order in the district court, the defendant cannot challenge it for the first time on this appeal. Fed. R. Crim. P. 12(f); *United States* v. *Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976); *United States* v. *Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); see also *United States* v. *Armedo-Sarmiento*, Dkt. No. 76-1113, slip op. 305, 315 (2d Cir., Oct. 28, 1976).

That Braunig in the District Court waived the issue presently advanced on appeal is readily apparent from the record. In her original motion, seeking suppression of the items taken from the apartment, Braunig did not raise the issue of notice at all, either in her papers or in the affidavit of her attorney offered as the factual predicate for the motion. (See Affidavit of William S. Ellis in Support of Defendant's Motion to Suppress dated August 10, 1976 at p. 2).* Thereafter, at the conference held before the District Court on August 12, 1976 on this suppression motion, after hearing from the Government as to why the notice of this eviction was lawful**,

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* The lack, at any stage of this proceeding, of an affidavit of a person "with knowledge" or other sufficient means of putting the question of notice into issue is alone sufficient grounds for this Court to uphold the search. *United States* v. *Gillette*, 383 F.2d 843, 848 (2d Cir. 1967).

** At this conference, the Government stated the following: "When Agent Myers went to the apartment in the company of Miss Flannigan and the City Marshal, Miss Flannigan had a lawful order of eviction pursuant to New York law. Miss Braunig had both notice under the statute, which has been upheld against constitutional challenge—the Velasquez case which I mentioned to your Honor earlier—and also the government would submit Miss Braunig had constructive notice because only the month earlier she had been faced with a similar eviction proceeding and she should have known or reasonably should have known that had her rent fallen into arrears, a similar course of action would again be adopted by the landlord (Transcript of conference of August 12, 1976 at pp. 11-12)."

Braunig's highly-competent defense counsel, although asserting orally "that the landlord and the government knew where my client was, in jail in Montreal, and that [the notice of eviction] was not mailed to her at that point," decided that "I won't question for the purpose of the argument that there was *valid notice of the eviction*" (Transcript of conference of August 12, 1976 at p. 15 (emphasis added)). Clearer evidence of waiver cannot be imagined for, having recognized the issue now sought to be raised, Braunig's attorney conceded for purposes of the District Court's decision the validity of the judgment of eviction and went on to premise his attack on the lawfulness of search on other issues. (*Id.* p. 15ff.)*

Shortly thereafter, Braunig's present counsel was substituted into this case. After being afforded an opportunity by the District Court to review the documents submitted on this motion and to determine if he desired to re-open the issue for a further factual inquiry (Transcript of conference on September 3, 1976 at pp. 8-9), counsel responded that "I have studied all of the papers with regard to motions and I would say that *I see no issues of fact*, and I think it is an issue of law for the Court and I don't think any hearing is necessary" (Transcript of conference of September 7, 1976 at p. 2). Again, counsel did not even intimate, much less raise, the issue now advanced.

Thus, two successive competent counsel for Braunig conceded—over a period of several weeks marked by ample opportunities to talk with Braunig, to investigate

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* Following this conference, Braunig's attorney filed a memorandum in support of her suppression motion, wherein, addressing the validity of the eviction order, he once again conceded: "There does not appear to be any dispute concerning the facts . . . ." and went on to concede that Braunig and Gardner had been "duly evicted" (Defendant's Memorandum of Law in Support of Motion To Suppress at pp. 1-2).

leads and interrogate witnesses—that the facts as stated by the Government were not in issue and that, on those facts, "there was valid notice of the eviction" and that the defendant was "duly evicted" from her former residence. Likewise, Judge Pierce, addressing the stipulated facts, readily concluded that "the landlady had obtained a lawful order of eviction following lawful notice to the tenant" (A. 86), and, on this basis, went on to decide the issues that Braunig raised below as grounds for suppression (*e.g.*, failure to secure a search warrant). It is only now that Braunig, having lost on the grounds she chose to raise before Judge Pierce, seeks to raise new grounds by going back to question the validity of the underlying judgment of eviction, and the facts on which it rests, which she never before disputed.*

The cases in this Circuit make clear that such a belated attack on an issue conceded below will not be permitted because to do so would thwart the orderly resolution of controversies by depriving the District Court and the adverse party of the opportunity of addressing the issue at the time that it can be dealt with expeditiously

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* Indeed, when defense counsel belatedly moved for a hearing on this suppression motion during the second week of trial, he again failed to raise even the slightest challenge to the underlying eviction judgment. Despite the trial court's statements that "it is my assumption that there is no dispute about the fact that there was a final order of eviction which the landlady sought to execute"; that Ms. Flanagan "took possession of the apartment pursuant to the final judgment of eviction" and was a "person lawfully entitled to enter the premises" (Tr. 654-55), statements clearly contrary to the argument Braunig now seeks to advance, defense counsel said nothing to challenge the validity of the order, notwithstanding the fact that Judge Pierce clearly regarded the legality of the eviction as the linchpin of his analysis upholding the search. At any rate, such last minute claims would clearly have been untimely. See Fed. R. Crim. P. 12(b)(3); *United States* v. *Mauro*, 507 F.2d 802 (2d Cir. 1974), *cert. denied*, 420 U.S. 991 (1975).

and efficiently, and when a complete factual record can be made. *United States* v. *Schwartz, supra; United States* v. *Rollins, supra.* Indeed, in circumstances such as those presented here, the rationale expressed by this Court in *United States* v. *Rollins, supra,* must control.

The validity of the judgment of eviction was conceded below. To the extent the question of the adequacy of notice was raised, it, too, was conceded. Finally, the underlying facts, which warranted these conclusions, were also undisputed. Consequently, any claim of invalidity of the eviction order or inadequacy of notice have been waived and the issue can hardly be raised on this appeal on the basis of new allegations inserted in place of the previously undisputed facts.

B. Braunig was extended constitutionally sufficient notice of the eviction.

Even had the defendant not waived any challenge to the validity of the New York City Civil Court judgment of eviction in the District Court, her argument that the eviction order is constitutionally infirm would nonetheless be unavailing.

Only through a tortured reading of the facts is Braunig able to make the argument that the notice given under N.Y.R.P.A.P.L. § 735 was unreasonable,* the true facts revealing that "under all of the circumstances"

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* Space permits us to identify only a few of the defendant's erroneous characterizations for this Court.

First, as noted earlier, Braunig speaks of repeated communications between Special Agent Myers and Ms. Flanagan and her attorney concerning the status of the eviction. As we observed earlier, there is nothing in the record to support this. Indeed, Judge Pierce found that Myers learned of the eviction only after

[Footnote continued on following page]

the notice afforded was, in fact, reasonable, especially the notice to Braunig.*

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the judgment had been secured (A. 84), a fact which Myers confirmed in his testimony (Tr. 872-73).

In like fashion, while Ms. Flanagan knew that Braunig and Gardner were not at the apartment when her process server made service of the notice of eviction, there is absolutely nothing in the record which would suggest that she knew where, in fact, they were; in particular, that Braunig was in jail in Canada. Since his incarceration in May 1975, Gardner had been in a number of prisons: the Metropolitan Correctional Centers in New York and San Diego, the Federal Correctional Institution at Danbury and the state prison at Vallhalla. The best Braunig can conjure is that the Government knew where she and Gardner were and, perhaps, since Ms. Flanagan and Special Agent Myers talked, he either did or could have told her of their whereabouts. The problems with this speculation are, among others, that there is no showing that they ever discusssed this eviction prior to Flanagan's informing Myers that a judgment had been entered; and even if they did discuss this matter, there is no showing that she ever asked Myers where Gardner and Braunig were or that he ever told her. Indeed, it is most likely that Flanagan simply left this entire matter to her attorney, with whom there is no showing that Myers ever spoke.

Then, using her appellate brief as if it were an affidavit to the District Court, counsel purports to state what Gardner and Braunig would have testified at a hearing on this matter. What this convicted perjurer (Braunig) and this much convicted swindler and admitted perjurer (Gardner) would testify to at such a hearing is speculative at best; indeed, Gardner's testimony on this issue would have been legally irrelevant as well. But the one thing that is of record is that Braunig, through all the pre-trial proceedings regarding the search of her apartment, never once requested a hearing.

* The notice or lack of notice to Gardner, to which Braunig's brief repeatedly adverts, is wholly irrelevant to suppression at Braunig's trial, where Gardner has no standing to object and any alleged denial of due process to him is never in issue. *Alderman* v. *United States*, 394 U.S. 165 (1969); *United States* v. *Galante*, Dkt. No. 76-1165, slip op. 968 (2d Cir., Dec. 14, 1976).

Unlike *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972), the facts of this case show that the landlady acted reasonably. In the first place, Ms. Flanagan concededly complied with the New York statute governing service in a summary eviction proceeding ("nail and mail"). N.Y.R.P.A.P.L. § 735. This precise form of statutory notice was upheld by this Court in *Valazquez* v. *Thompson*, 451 F.2d 202 (2d Cir. 1971). Since the "test under the due process clause . . . is not whether the [defendant] actually receives notice, but rather whether the method used is one reasonably calculated to give actual notice" *United States* v. *Smith*, 398 F.2d 173, 177-78 (3d Cir. 1968), given the fact that there is nothing in the record to suggest that the landlady knew where Braunig was, her compliance was § 735 is *per se* reasonable.*

Moreover, even if the landlady knew Braunig's whereabouts, in the context of this case, the notice given would nonetheless withstand attack, because, independently of the statutory notice, Braunig can reasonably be inferred to have been on actual notice of the pendency of eviction proceedings. On March 10, 1976, only two days prior to her arrest in Canada, Braunig tendered $3125 in back rent to the landlady in order to avoid a prior judgment of eviction which Ms. Flanagan had secured against her and Gardner. From this event, it is clear that as a previously delinquent "month to month" tenant, who had entered the apartment lease under a false name and then

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* It is interesting and highly significant to note that Braunig entered into the apartment lease under the name "Susan M. Gardner" and that this was the name by which Ms. Flanagan knew her. Assuming *arguendo* that the landlady knew where Braunig was, any notice directed to her and addressed to "Susan M. Gardner" would have been a fruitless endeavor. Braunig had concealed her true identity from Flanagan, just as she had done with her charge accounts and with the same result: by calling herself "Gardner" she could not be traced.

disappeared from sight, Braunig knew or reasonably should have known that if her rent again fell into arrears, for whatever reason, a new eviction proceeding would be commenced to dispossess her and that there was no basis from which the landlady could infer her whereabouts. Yet, she did nothing. Knowing that both she and Gardner were in custody and that it was likely that Ms. Flanagan would again institute eviction proceedings, she took no steps whatever to apprise the landlady of her whereabouts. Braunig's failure to act, when coupled with her actual knowledge concerning her precarious tenancy and the statutory notice given by the landlady, is enough to charge her with notice of the eviction proceedings.* As Chief Judge Clark noted, quoting from *The Lulu*, 77 U.S. 192, 201 (1869), "[A] party to a transaction, where his rights are liable to be injuriously affected by notice, cannot wilfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from notice if it had actually been received." *N.L.R.B.* v. *Local 3, Retail, Wholesale & Department Store Union*, 216 F.2d 285, 288 (2d Cir. 1954).

In sum, nothing in the record indicates that the landlady knew where Braunig was or that her reliance on service under § 735 was unreasonable under the circumstances, on the contrary, Braunig knew that her eviction from the apartment was likely and did nothing. On these facts, Braunig can not now complain of the purported lack of notice.

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* Again converting her appellate brief into an unsworn affidavit, Braunig now represents to the Court (App. Br. 13) that, had a hearing been held, she or Gardner would have testified of her attempts to send "intermediaries" to Ms. Flanagan. This reflects two things: (1) Braunig's actual knowledge that her eviction was likely, hence the intermediaries, and (2) that she knowingly waived this issue below.

C. The search was lawful.

Apart from her claim that the notice of eviction was legally insufficient, Braunig erroneously claims (as she did in the District Court) that she maintained a reasonable expectation of privacy in her former apartment because, under New York landlord and tenant law, she continued to hold certain possessory rights in the personal property located in that apartment following her eviction.* The District Court correctly rejected this claim.

Judge Pierce properly recognized that, while under New York landlord and tenant law the defendant retained "a continuing property interest in the items of personalty seized from the apartment," "the crucial question [on the motion to suppress was] whether . . . the defendant maintained a reasonable expectation of privacy in [those] items . . ." (A. 85). As this Court recently held, a defendant's "constitutional right of privacy must be measured by whether he had an expectation of privacy *which society was prepared to recognize as reasonable.*" *United States* v. *Head*, Dkt. No. 76-1249, slip op. at 650-51 (2d Cir. Nov. 29, 1976) (emphasis added). Judge Pierce correctly ruled that Braunig, having violated her bail limits, travelled to Canada, been arrested while committing a crime and thereupon incarcerated, all of which resulted in her lawful eviction from the apartment, had no expectation of privacy which society was prepared to recognized as reasonable. Moreover, as this Court has declared, "The Fourth

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* As the Government observed in the District Court, irrespective of the applicable state law, the search here at issue is governed by federal privacy standards. See *United States* v. *Magda*, Dkt. No. 76-1298, slip op. 1039-40 n.2 (2d Cir., Dec. 22, 1976); *United States* v. *Galante*, Dkt. No. 76-1165 slip op. 967-69 nn. 11 and 12 (2d Cir., Dec. 14, 1976) and *Elkins* v. *United States*, 364 U.S. 206, 224 (1960).

Amendment protects 'people, not places'; it is the invasion of pirvacy, and not some property interest, that triggers the operation of the exclusionary rule." *United States* v. *Galante*, *supra*, slip op. at 967 n.11; and see *id.*, slip op. at 969 n.12.* See also, *e.g.*, *United States* v. *Miller*, — U.S. —, 44 U.S.L.W. 4528, 4530 (Apr. 21, 1976); *Cardwell* v. *Lewis*, 417 U.S. 583, 589 (1974); *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967); *Jones* v. *United States*, 362 U.S. 257, 266 (1960); *United States* v. *Parizo*, 514 F.2d 52, 54 (2d Cir. 1975); *United States* v. *Cowan*, 396 F.2d 83, 86 (2d Cir. 1968).

Once recognizing that a reasonable expectation of privacy, and not state law created propetry rights, governed the inquiry, the District Court properly held the search lawful because, at the time that the landlady consented to the search by Agent Myers,** Braunig had "no

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* As this Court recently made clear in *United States* v. *Galante*, *supra*, any state law creating property rights in the personalty seized, but not in the premises searched, does not invest a defendant with standing to contest a search. See *Id.*, slip op. at 967-69 nn. 11 and 12. This distinction was described by Judge, now Justice, Stevens in the following terms:

> "There is a difference between a search and a seizure. A search involves an invasion of privacy; a seizure is a taking of property. The owner of a chattel which has been seized certainly has standing to seek its return. It does not necessarily follow that he may also object to its use as evidence."

United States v. *Lisk*, 522 F.2d 228, 230 (7th Cir. 1975), cited with approval and followed in *United States* v. *Galante*, *supra*, slip op. at 967 n. 11.

** In the District Court and again on this appeal, Braunig contends that a search warrant was required for a valid search of these premises. As the District Court found, however, while a search warrant might perhaps have been the preferable course, it was not required in view of the landlady's consent. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973). See also, *e.g.*, *United States* v. *Matlock*, 415 U.S. 164, 165-66 (1974); *United States* v. *Mullens*, 536 F.2d 997 (2d Cir. 1976); *United States* v. *Miley*, 513 F.2d 1191, 1201 (2d Cir. 1975), *cert. denied*, 423 U.S. 842 (1976); cf. *United States* v. *Galante*, *supra*.

reasonable expectation of privacy in the premises" (A. 86); indeed, as is shown *supra*, she had a reasonable expectation of eviction.* Thus, in upholding the search, the trial judge noted the following:

> "A series of cases have upheld searches made of hotel rooms shortly after the expiration of the rental period. See *United States* v. *Parizo*, 514 F.2d 52 (2d Cir. 1975); *United States* v. *Croft*, 429 F.2d 884, 887 (10th Cir. 1970) (search lawful even though the prior arrest of defendant prevented him from extending the rental period); *United States* v. *Cowan*, 396 F.2d 83 (2d Cir. 1968) (no reasonable expectation where items were being held by innkeeper pursuant to a statutory lien for unpaid rent);** *United States* v. *Lewis*, 400 F. Supp. 1046 (S.D.N.Y. 1975). Further, an earlier decision of the Circuit Court appears to have proceeded on the assumption that a search of an apartment conducted with the landlord's consent following a lawful eviction would be a lawful search. See *United States* v. *Paroutian*, 299 F.2d 486, 488 (2d Cir. 1962).

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* Judge Pierce found that society was not prepared to recognize Braunig's privacy interests as reasonable, simply because "It would not have been reasonable for the defendant, incarcerated in Canada, to expect that the items in her apartment would remain private where the rent had fallen in arrears and where the landlady had obtained a lawful order of eviction following notice to the tenant (A. 86)." And he concluded that "the defendant, sitting in a Canadian jail [having gone to Canada in violation of her bail limits] and having just recently staved off the first eviction proceeding, could not reasonably have expected that the items seized would have remained private under the circumstances." (A. 89-90). See also Transcript of Conference of August 12, 1976, at pp. 23-24.

** In *United States* v. *Cowan*, *supra*, this Court completely rejected a state law property rights claim almost identical to that made by Braunig (396 F.2d at 86-87).

The thrust of the above cases makes clear the appropriate decision here. As was the case in these decisions, here the rental period had expired and the lessor had taken the appropriate legal steps to regain exclusive possession. Once that had been accomplished, the lessor consented to a search of premises.* The leasehold had expired, and the items of personality could be properly removed to make way for a new tenant. In fact, since Ms. Flanagan knew of the ongoing FBI investigation, it was her right, if not her duty, to inform the authorities and to invite them to enter the premises. See *United States* v. *Cowan*, *supra*, 396 F.2d at 87. The landlady's entry following a lawful eviction order, and the subsequent consent search, must be found to have been lawful. See *United States* v. *Roberts*, 465 F.2d 1373, 1374-75 (6th Cir. 1972).** The search

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* It is clear that Ms. Flanagan being in lawful possession of the apartment could consent to a search thereof. *E.g.*, *United States* v. *Ellis*, 461 F.2d 962, 967 (2d Cir.), *cert. denied*, 409 U.S. 366 (1972):

> "It long has been recognized that *consent to a search justifies a warrantless intrusion.* [citations omitted]. It also is well established that *where one's right to occupancy or possession is equal or superior to another's, his consent to a search is sufficient to make the search lawful* [Emphasis added]."

** The decision of the Sixth Circuit in *United States* v. *Roberts*, *supra*, is squarely on point. There,

> "The defendant was identified as a resident of an apartment house in Lookout Heights, Kentucky, where he was living under the name of William Hollis. Agents of the Federal Bureau of Investigation talked to the owner of the apartment house and asked that they be notified if the defendant moved out so that they could search the apartment. Subsequently, the owner evicted the defendant, notified the Federal Bureau of Investigation that he had been evicted and a search was made with the permission of the landlord." (465 F.2d at 1374).

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> is not made unlawful because the defendant's conduct leading to her arrest in Montreal prevented her from returning to New York for the purpose of renewing the lease or taking custody of her personality. Where a defendant has been arrested and is therefore prevented from taking new steps to insure the privacy of a leasehold, the Courts nevertheless have held that no reasonable expectation of privacy is present. See *United States* v. *Croft*, *supra*, 429 F.2d at 887; *United States* v. *Lewis*, *supra*, 400 F. Supp. at 1049 * (A. 87-88)."

Moreover, even were one to make the rather far-fetched assumption urged by Braunig that the notice underlying the judgment of eviction was unconstitional, it does not follow that the landlady's repossession of the apartment was unlawful since the common law of New York allows re-entry of an apartment by a landlord without any legal process at all in circumstances such as at bar.**

Based on those facts, the Court held that

> "The evidence viewed in the light most favorable to the Government adequately supports the trial court's conclusion that *there was no collusion between the landlord and the Government Agents resulting in the eviction of Hollis and the subsequent search. We must accept the fact that the defendant was lawfully evicted from the premises and, therefore, the search of the apartment,* after the defendant had moved out, *with the consent of the landlord, was a legal search* (*Id.* at 1374-75) (emphasis added)."

* In reaching its conclusion that the search was lawful, the District Court readily distinguished *United States* v. *Bothelo*, 360 F. Supp. 620 (D. Hawaii 1973), a case here relied on by Braunig. See A. 88-89.

** Assuming *arguendo* the invalidity of the judgment of eviction obtained through the summary eviction proceeding, the entry of the landlady into Braunig's former apartment was nonetheless lawful. "A landlord's common law right of regaining possession

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Lastly, even were one to go a step further and to assume *arguendo* that the landlady's presence at the apartment was unlawful,* the search conducted by Agent Myers would, nonetheless, remain proper.

Myers was called by the landlady and informed that she had a judgment of eviction that she intended to execute. He then met her and a City Marshal at the apartment. The Marshal executed the judgment and Flanagan, the Marshal and Myers entered the premises. Once inside, Flanagan consented to Myers conducting a

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without process of law, when it can be done peaceably, has not been abrogated by the statutory remedy of summary proceeding." 2 J. Rasch, *Landlord & Tenant*, § 999 at p. 444 (1971) (footnotes omitted). "When a tenant wrongfully continues in possession of demised premises after the expiration of his term, the landlord, having the right to the immediate possession thereof, may regain such possession without process of law. He may enter and take possession, provided he can do so in a peaceable manner [and without force]." *Id.* § 989 at 433-34; *Liberty Industrial Park, Corp.* v. *Protective Packaging Corp.*, 71 Misc. 2d 116, 335 N.Y.S. 2d 333 (Sup. Ct. 1972) (and the cases there cited), *aff'd.*, — App. Div. 2d —, 351 N.Y.S. 2d 944 (2d Dept. 1974).

In the present case, Braunig's lease for the apartment had expired and she became a month-to-month or hold-over tenant commencing on March 31, 1976. From at least that date (in fact, from March 10), Braunig paid no rent. The landlady was, therefore, entitled to the immediate possession of the apartment when she re-entered the premises on May 25, 1976, and her entry was lawful under the common law of New York.

* Alternatively, while the District Court did not reach the issue in its decision on Braunig's suppression motion, viewing all of the facts and circumstances of this case (such as Braunig's flight from New York in violation of her bail limits and her going to Canada to commit a crime), a finding that the defendant had abandoned her apartment would also have been correct. See *Mullins* v. *United States*, 487 F.2d 581 (8th Cir. 1973); *United States* v. *Wilson*, 472 F.2d 900, 903 (9th Cir. 1973) (and the cases there cited), *cert. denied*, 414 U.S. 868 (1974); *United States* v. *Cowan*, *supra*; *cf.*, *Abel* v. *United States*, 362 U.S. 217 (1960).

search and, in reliance upon her consent, Myers searched the apartment and seized a number of items. Clearly, Myers cannot be charged with knowledge of the intricacies of New York eviction law or the constitutional sufficiency of notice which is given thereunder.* Ms. Flanagan represented herself as being in possession of a lawful state court judgment which permitted her to legally enter the premises and retake possession. Myers had a right to rely on this display of apparent, if not actual, authority and, with the landlady's consent, to conduct a search. "Because she had apparent authority to consent, an officer relying on her consent to conduct a search would not be acting unreasonably." *United States* v. *Hughes*, 441 F.2d 12, 13 n. 3 (5th Cir.), *cert. denied*, 404 U.S. 849 (1971); *cf.*, *United States* v. *Matlock*, 415 U.S. 164 (1974).**

In short, where the only illegality bound up with this search is claimed to be that of the landlady, and there is nothing *in the record* to indicate that Agent Myers acted in any fashion other than good faith, this Court should "simply decline to extend the court-made exclusionary rule to [this case] in which its deterrent purpose would not be served." *Desist* v. *United States*, 394 U.S. 244, 254 n.24 (1969).

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* Although Braunig seeks, in her brief, to paint Myers, and to a lesser extent Flanagan, as nefarious bandits of the worst order who unmercifully conspired to violate her civil rights, the record does not suggest this in even the slightest way. Indeed, defense counsel can't even keep his accusations straight, but instead tries to have his penny and his cake by arguing that while Flanagan did not know where Braunig and Gardner were, she must have known where they were, in order to argue a defect in the notice which she gave (App. Br. 13 and 17).

** Further, assuming *arguendo* that Flanagan's entry into the apartment was unlawful, such conduct by a private person is clearly not chargeable to the Government. The asserted illegal-

[Footnote continued on following page]

D. No hearing was required.

If Braunig had properly challenged the voluntariness of Ms. Flanagan's consent to search the apartment, a hearing might have been in order. *E.g., United States* v. *Miley*, 513 F.2d 1191 (2d Cir. 1975), *cert. denied*, 423 U.S. 842 (1976). She never did. Instead, at each and every step of these proceedings (until very late in the trial) Braunig conceded that the landlady had voluntarily consented to the search. Only belatedly, shortly before the close of the Government's proof, did Braunig seek to put the issue of the landlady's consent in issue and, then the District Court correctly ruled that based upon the inadequate, unsworn showing made by the defendant, no hearing was required.

In advance of trial, Braunig clearly waived any right she had to a hearing on the issue of the landlady's consent. As her attorney put it: "I see no issues of fact, and I think it is an issue of law for the Court and *I don't*

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ity claimed by Braunig is Flanagan's (in the fashion by which she obtained the eviction order) and not the Government's (in fashion in which it conducted the search). Contrary to Braunig's assertions, nothing in the record indicates that Myers or anyone else connected with the prosecution was either directly or indirectly involved with the decision to obtain, the actual obtaining, or execution of this judgment. Myers simply met Flanagan at the apartment and, once she had entered into the premises, conducted a search with her consent. Clearly, the illegality of a private person, such as Flanagan, is not imputable to the Government. *Burdeau* v. *McDowell*, 256 U.S. 465 (1921); *United States* v. *Sherwin*, 539 F.2d 1, 6 (9th Cir. 1976) (*en banc*); *United States* v. *Pryba*, 502 F.2d 391, 398 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975); *United States* v. *Capra*, 501 F.2d 267, 272-73 n. 4 (2d Cir. 1974), *cert. denied*, 420 U.S. 900 (1975); *Barnes* v. *United States*, 373 F.2d 517, 518 (5th Cir. 1967); *United States* v. *Durkin*, 335 F. Supp. 922, 926 (S.D.N.Y. 1971) (Weinfeld, *D.J.*) .

think any hearing is necessary"* (Transcript of Conference on Sept. 7, 1976 at p. 2 (emphasis added)). Based on this and similar concessions, the trial court found the fact that "Ms. Flanagan consented to a search of the apartment by the FBI" (A. 85) to be undisputed.

Nothing to the contrary was ever offered by the defendant,** until late in the trial when Braunig sought a hearing on the issue of the landlady's consent based upon an extraneous "*Brady*" disclosure concerning Special Agent Myers.

At trial, the Government called Agent Myers to the witness stand in order to authenticate the items which he had seized during the search and move them into evidence (Tr. 852ff.). In advance of doing so, the Govern-

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* This statement, made by Braunig's present counsel, was in accord with the earlier concessions of his predecessor. On appeal, counsel contends that he "was obligated to prepare under great pressure," hence this concession. Precisely this sort of claim has previously been rejected by this court, where, as here, experienced and competent counsel previously represented the accused and did not contest the lawfulness of the consent (Tr. 662-63). *United States* v. *Bennett*, 409 F.2d 888, 901 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969).

** It is true that very late in the trial, on the day before the Government rested, the defendant intimated that she might have an offer of proof with regard to Ms. Flanagan based on the oral representations from defendant Gardner's appellate attorney, who was assisting in her defense (Tr. 642-43). Judge Pierce correctly declined to entertain such an unsworn, hearsay offer at such a belated point in the trial (*id.*). See *United States* v. *Gillette*, *supra*. Moreover, when later in the context of the "*Brady*" disclosure (*infra*), the District Court took an offer of proof from the defense concerning the search, the defendant did not make one concerning Ms. Flanagan, thereby waiving any claim which she might have had. See Fed. R. Crim. P. 12(f); Fed. R. Evid. 103(a)(2).

ment timely disclosed * certain information (disclosed earlier to the Court in an *in camera* affidavit) concerning Myers' status as a potential (albeit immunized) subject of a Department of Justice investigation into alleged surreptitious entries ("break-ins") by members of the FBI, which the District Court found to come within the purview of *Brady* v. *Maryland*, 373 U.S. 83 (1963).**

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* As this Court has said, "Neither *Brady* nor any other case we know of requires that disclosure under *Brady* must be made before trial." *United States ex rel. Lucas* v. *Regan*, 503 F.2d 1, 3 n. 1 (2d Cir. 1974), *cert. denied*, 420 U.S. 939 (1975). This is especially so when the *Brady* disclosure, such as that here, was "marginal" in the extreme. *Cf. Grant* v. *Alldredge*, 498 F.2d 376, 382 (2d Cir. 1974). Moreover, where, as here, despite the trial court's warning concerning the possibility of this *Brady* disclosure (Tr. 8-9), the defendant did not specifically request disclosure from the Government, she cannot now complain concerning when that disclosure was made. See *United States* v. *Agurs*, — U.S. —, 44 U.S.L.W. 5013 (June 24, 1976).

** The Government's disclosure, as ordered by the trial court, was as follows:

> "4. It has recently come to the attention of the United States Attorney's office that Special Agent Myers was one of many subjects of a Grand Jury investigation—recently a matter of extensive news coverage—being conducted by the Civil Rights Division of the Department of Justice relating to alleged surreptitious entries or "break-ins" conducted by agents of the Federal Bureau of Investigation against certain individuals and political groups.
>
> 5. I have confirmed in discussions with Agent Myers that: (1) he was advised in the early summer of 1976 (after the conclusion of the *Gardner* trial) that he was among the subjects of an investigation into various violations of Federal criminal civil rights statutes; (2) he was subpoenaed to testify before said Grand Jury on September 8, 1976, but that subpoena has been adjourned; (3) he retained counsel with regard to this matter; and (4) he (along, I am told, with others) was granted transactional immunity with regard to the transactions covered by the investigation. I have also been shown an executed original of said immunity agreement." (Sealed Affidavit of Assistant United States Attorney Eugene Neal Kaplan dated September 17, 1976 at p. 2).

Only after this disclosure was made did Braunig request a hearing on this issue.

Following the "*Brady*" disclosure, the following colloquy occurred:

> Mr. Jacobs: Your Honor, I have just been shown by Mr. Kaplan paragraphs 4 and 5 of an affidavit that was submitted to your Honor, which affidavit, in substance, states that Agent Myers of the FBI is subject to an investigation by the Department of Justice Civil Rights Division, an investigation with regard to break-ins conducted by the FBI of certain individuals and political groups.
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> * * * * *
>
> Mr. Jacobs: He has been subpoenaed to testify. The subpoena has been adjourned. He has retained counsel and has been given transactional immunity.*
>
> Your Honor, it is my position, firstly that this information was material with regard to . . . search of the apartment of Mr. Gardner and Miss Braunig. This information was never known to either predecessor counsel or myself until this very moment.
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> * * * * *
>
> The Court: Now, given this situation and given what you state would have been your deci-

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* Throughout the defendant's brief, Braunig's counsel relates that the Government knew but did not disclose this "*Brady*" material. Counsel unfairly intimates that Government counsel knew of it on August 12, 1976 (App. Br. 8) when the record clearly shows that we did not (Tr. 652-53). Counsel intimates that while "the Government was required to disclose the Myers break-ins, it had not done so . . . . (App. Br. 21)." The record shows not only that we did, but that we did so in timely fashion.

sion at the time the issue of hearing or no hearing arose, tell me what you would have done with the information on the hearing?

Mr. Jacobs: On the hearing?

The Court: On the hearing.

Mr. Jacobs: On the hearing with regard to the apartment, I would have questioned Agent Myers with regard to whether he was ever at the apartment other than the time that he says he was there with the consent of the landlady——

The Court: Doesn't that assume they would have called him to take the stand?

Now, there is one privotal person in this whole business of the search of the apartment and the seizure of items at the apartment, and that is the landlady.

Now, it is my assumption that there is no dispute about the fact that there was a final order of eviction which the landlady sought to execute. and that she went to that apartment with the City Marshal, and, as I recall it, she invited Agent Myers to join her there, and she took possession of the apartment pursuant to the final judgment of eviction, and the agent was present at her invitation, and that consequently any search which was undertaken was a consent to search by the person lawfully entitled to enter the premises.

Now, assuming that we had a hearing, and assuming that Mrs. Flannigan was the sole witness called, and that it was the testimony that in her presence certain items were seized and taken from the apartment, and the government closed its presentation of evidence on the hearing at that point, where would we be?

> The key witness on the whole thing is Mrs. Flannigan, the landlady, and this, indeed, she gave consent to the FBI to come into the premises, then I don't see that it would change anything in terms of my ruling that the seizure was lawful *
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> * * * * *
>
> The Court: I should also indicate that in making my decision on the motion to suppress with reference to the apartment, I did not rely upon the Government's contention that the agent, that is, Agent Myers, did not urge the landlady to let him in. It sufficed for my purposes to determine whether or not the agent's presence there was lawful and by consent of the person entitled to possession of the premises, and I predicated my decision on that" (Tr. 652-59) (emphasis added).**

The record is clear. Despite the disclosure concerning Myers, the district judge found that this in no way altered the thrust of his decision upholding the search. Braunig's offer of proof was clearly inadequate to place the validity of Ms. Flanagan's consent in issue, as Judge Pierce properly found.*** See *United States* v. *Warren*, 453 F.2d

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* Throughout defendant's brief, defense counsel, beneath his dignity to be sure, constantly refers to Myers illegal 'break-ins." *E.g.* App. Br. 9, 20-21. Given the clarity of the record (Tr. 657), this sort of smear tactic can only be regarded as an unfair and unjust attack by defense counsel on a man presumed to be innocent.

** In face of defense counsel's argument that Braunig had a right to know whether Myers had ever previously "broke in" to her apartment, the Court requested and Myers filed an affidavit explicitly stating that "he did not enter that apartment at any prior occasion" (Tr. 657-58; Court's Exhibit 6).

*** Myers was, of course, cross-examined at length during the trial, *cf.*, *United States* v. *Rosenstein*, 474 F.2d 705, 715 (2d Cir. 1973), and defense counsel did not avail himself of the trial court's willingness to hear an offer of proof concerning the use of the "Brady" disclosure during such endeavor (Tr. 649, 847).

738, 742-43 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972). Try as she might, Braunig cannot escape from her clear waiver on the issue of the landlady's consent * and, for that reason, the District Court did not err in denying her belated request for a hearing. *Cf.*, *United States* v. *Schwartz*, *supra*; *United States* v. *Rollins*, *supra*.

POINT II

The District Court Properly Admitted Proof Concerning The State Bank Of Albany Similar Act.

In the third point of her brief, Braunig challenges the admission of certain evidence concerning two checks that were falsely certified on the State Bank of Albany by means of the phony certification stamp found in her desk drawer, not because such evidence did not constitute similar act proof from which the jury could properly infer knowledge and intent with respect to the two forged Canadian checks in Counts Five and Six,** but

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* Indeed, the voluntary nature of the landlady's consent is manifested by the fact that, following the search conducted by Agent Myers at the apartment, Ms. Flanagan, of her own accord, delivered Braunig's diary, which she had discovered subsequent to the search, to the FBI headquarters in New York City. See A. 85 and 90.

** Quite clearly, proof of this State Bank of Albany similar act properly comes within the boundaries of Fed. R. Evid. 404(b) and the case law controlling the application of that rule. See, *e.g.*, *United States* v. *Grady*, Dkt. No. 76-1201 slip op. at 302 (2d Cir. Oct. 27, 1976); *United States* v. *Magnano*, Dkt. No. 76-1011 slip op. at 5477 (2d Cir. Sept. 7, 1976): "Evidence of prior criminal acts is admissible unless offered *solely* to prove criminal character or disposition or the proffered evidence is of such a *highly* prejudicial nature as to *overwhelm* its probative value" (emphasis sup-

[Footnote continued on following page]

rather because there was insufficient evidence to connect Braunig with this falsified certified check scheme to permit the District Court, in its "wide range of discretion", *United States* v. *Santiago*, *supra*, 528 F.2d at 1135, to admit this proof against her. The trial judge correctly found sufficient connection between Braunig and this similar act and properly permitted the jury to consider this proof in accordance with its instructions.*

The proof concerning this State Bank of Albany similar act was as follows: During his search of Braunig's apartment, Special Agent Myers discovered a State Bank of Albany certification stamp and stamp pad (GX 456A and B), as well as a blank State Bank of Albany checkbook (GX 455), in two of her desk drawers (Tr. 868-868A, 877). An official of the bank identified the

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plied); *United States* v. *Virnet*, 539 F.2d 295, 297 (2d Cir. 1976); *United States* v. *Chestnut*, 533 F.2d 40, 49 (2d Cir.), *cert. denied*, — U.S. — (1976); *United States* v. *Santiago*, 528 F.2d 1130, 1134 (2d Cir.) ("similar acts may be proved in order to show guilty knowledge"), *cert. denied*, — U.S. — (1976); *United States* v. *Natale*, 526 F.2d 1319, 1331 (2d Cir. 1975); *United States* v. *Bermudez*, 526 F.2d 89, 96 (2d Cir. 1975), *cert. denied*, — U.S. — (1976); *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). Moreover, in utilizing this rule "The balancing of relevance against prejudice is primarily for the trial judge; and, without a showing of abuse, his exercise of discretion will not be overturned." *United States* v. *Albergo*, 539 F.2d 860, 863 (2d Cir. 1976). *Cf.* Fed. R. Evid. 403.

* Braunig appears to contend that the trial court's failure to restrict this similar act proof to the Barclay's fraud counts (Counts 5 and 6) was erroneous. While, as the district judge properly held, this proof bore on all counts, it is clear that, in summation, both counsel for the Government and Braunig pinpointed its applicability to the bank fraud counts (*e.g.* Tr. 1071-72; 1134-37) and, as evidenced by their verdict (acquitting the defendant on Counts 7 and 8), the jury well understood the thrust of this proof and point by point reviewed the evidence against Braunig, obviously refraining from tarring her with a broad "bad man" brush.

checkbook as belonging to an account at the State Bank of one Eric Thomas (GX 352; Tr. 761, 763-63) and indicated that two forged checks in the amount of $25,000 each (GX 353-547) had been drawn on that account in August 1973 and falsely certified through the use of a purported State Bank of Albany certification stamp (Tr. 762-64). Donald Stangel, the Government's questioned documents examiner, then identified the certification stamp found in Braunig's apartment desk (GX 456A) as being the certification stamp used to falsely certify the two $25,000 checks (GX 353 and 354) (Tr. 782-83).

Prior to receiving this evidence, the District Court received several offers of proof from the Government concerning its admissibility (Tr. 10-19, 571-80; letter to Hon. Lawrence W. Pierce from Assistant United States Attorney Eugene Neal Kaplan, dated September 17, 1976). In each of these offers, the Government clearly connected the two forged checks (GX 353 and 354) with Ms. Braunig's co-defendant Michael Gardner by means of his admission "that he had given these forged checks to [a] Mr. [Flanders], that they were falsely certified, that they had been cashed and that Mr. Gardner derived the benefits" thereof (Tr. 12).* Indeed, on

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* This admission was made by Gardner while testifying as a Government witness in the case of *United States* v. *Ralph Waldo Flanders*, No. 13234-MML (C. D. Cal 1974). While these admissions were not received into evidence during Braunig's trial, they were properly considered by the trial court in weighnig the admissibility of this proffered proof. Fed. R. Evid. 104(a) (The trial judge in determining preliminary questions on the admissibility of evidence "is not bound by the rules of evidence" and may consider hearsay, such as Gardner's sworn testimony in California. See Advisory Committee Note to Fed. R. Evid. 104 (a)).

this appeal, Braunig concedes that the "Bank of Albany fraud was Gardner's" (App. Br. 22).*

The question whether sufficient evidence connected Braunig with the phony certification stamp and the two forged checks was closer. While the stamp and the checkbook were found in her desk, there was no direct proof linking Braunig with the two forged checks. However, the district judge correctly recognized that "proof of connection . . . may be made by circumstantial, as well as direct evidence", *United States* v. *Natale*, *supra*, 526 F.2d at 1173, and, after considering a number of the circumstantial indicia connecting Braunig with this similar act, properly ruled that the Government had provided "a rational basis from which the jury may conclude" that the Albany bank scheme was linked to the defendant. *Id.* See also Fed. R. Evid. 104(b).

Among the circumstantial indicia supplying the nexus between Braunig and the Albany bank fraud, no doubt the most important was the discovery of the phony certification stamp (GX 456A) and the "Eric Thomas" checkbook (GX 455) in two of Braunig's desk drawers,** located in the apartment where she had resided alone

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* Since Braunig and Gardner were charged in the indictment and proven at trial to have been continuously acting as co-schemers, this concession alone warrants the admissibility of the Albany bank proof, since it was clearly probative of the existence of the schemes charged. *United States* v. *Araujo*, 539 F.2d 287, 289 (2d Cir. 1976).

** As Agent Myers' testimony shows, numerous other items were found in this desk, including items that could only have been acquired by Braunig subsequent to Gardner's incarceration.

for almost a year.* Possession of the stamp itself (on its face contraband) was a crime. Ms. Braunig's relationship with Gardner was an extremely close one, both personally and otherwise; she was, in addition to his lover, his secretary, confidant and "partner-in-crime", intimately and actively involved in all of his illegitimate "business" affairs (Tr. 14-15, 113, 618). Even Braunig herself admitted to the Grand Jury that from September 1972 forward she was Gardner's "Secretary, assistant, gal Friday, receptionist, office manager when it was necessary, depending on what office we were in, what was happening" (Tr. 691).

In addition, early in 1973, Braunig began to call herself Susan Gardner (Tr. 673) and soon thereafter, began to transfer her charge accounts and the like into the "S. M. Gardner" name, see *supra*, pp. 10-12. Then, of course, there is the note from Braunig to Gardner (GX 531) wherein she states: "You have done me the supreme honor of making me your true partner in every sense of the word . . . How we have now become 'Partners-in-Crime' and learned to enjoy it. . . ."

Braunig's sole possession of the phony certification stamp and the "Eric Thomas" checkbook alone supplied sufficient nexus to connect her with this similar act. Given all of the other evidence known to him, including the pattern of Braunig's and Gardner's frauds over the past several years, the district judge was surely in a position to rule that the Government was

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* While Braunig originally shared this apartment on a part time basis with Gardner (who would regularly commute between it and his family home several blocks away), she resided there alone from May 1975 (when Gardner was jailed) until March 1976 (when she was jailed in Canada). Judge Pierce noted, with dry understatement, "I think a reasonable person could be expected to wonder what a bank certification was doing in one's household" (Tr. 15).

> "offering this [similar act proof] for the very limited purpose and it is the only purpose for which they can offer it of bearing on knowledge and intent and motive, which, as you know are key issues with respect to, I suppose, all of these counts before us here. I believe they are entitled to get it into evidence" (Tr. 579).

Fed. R. Evid. 104(b); *United States* v. *Natale*, *supra*, 526 F.2d at 1173; *United States* v. *Busard*, 524 F.2d 72, 74 (5th Cir. 1975), *cert. denied*, — U.S. — (1976); *United States* v. *Montalvo*, 271 F.2d 922, 925 (2d Cir. 1959), *cert. denied*, 361 U.S. 961 (1960); *cf.*, Fed. R. Evid. 401 and 901(a); *United States* v. *Thompson*, 503 F.2d 1096, 1099 (8th Cir. 1974); *United States* v. *Wright*, 466 F.2d 1256, 1258-59 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973).*

Having "preliminarily" ruled that the State Bank of Albany similar act was rationally connected with Braunig, hence admissible, the district judge (in accordance with Fed. R. Evid. 104(b) and the cases noted *supra*) correctly permitted the jury to consider this evidence in the context of his clear and precise similar act instructions (A. 57-59) which concluded by stating:

> "I remind you also that you are not to consider any such act which you find to have been established

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* Defendant's reliance on *United States* v. *Vosper*, 493 F.2d 433 (5th Cir. 1974), is misplaced for two reasons. First, it is a case decided under the Fifth Circuit's "exclusionary" approach to similar acts prior to the adoption of Fed. R. Evid. 404(b), *id.* at 437, which has always been rejected by this Court, see *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). Second, in *Vosper* there was little apart from his presence to connect him with the similar act. *Id.* Here, as demonstrated, the trial judge had ample evidence to sustain the nexus.

only as to some other person as evidence against the defendant here for any purpose" (A. 59).*

POINT III

Any Error Arising From The Apartment Search Was Harmless.

Assuming *arguendo* that the apartment search was unlawful and that the fruits thereof should not have been admitted into evidence, "these items 'shrink to insignificance' when compared with the properly admitted evidence" of Susan Braunig's guilt. *United States* v. *Anderson*, 500 F.2d 1311, 1319 (5th Cir. 1974). The standard for the invocation of the harmless error rule is not dependent, as defendant appears to suggest, upon what she claims was the prosecutor's "obvious reliance on the apartment search evidence" which was admitted by the District Court (App. Br. 24), but rather whether this Court, on "[its] own reading of the trial record and on what seems to . . . have been the probable impact . . . on the minds of an average jury," *Harrington* v. *California*, 395 U.S. 250, 254 (1969), is "able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). See also, *e.g.*, Fed. R. Crim. P. 52(a); *Brown* v. *United States*,

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* At most, the admission of this proof was harmless error. Both logically and factually, by virtue of the court's instructions and the verdict acquitting Braunig on the Fun Tyme counts (one of the schemes of which Gardner was convicted of at his own trial), the jury demonstrated that they carefully considered her role in the frauds charged independent of Gardner and with respect to each separate scheme. Had the jury found this proof unconnected with Braunig, they could only have treated it—as they did the Fun Tyme proof—as evidence of a crime by Gardner and not held it against Braunig.

411 U.S. 223, 231-32 (1973); *Schneble* v. *Florida*, 405 U.S. 427 (1972); *Harrington* v. *California*, *supra*; *United States ex rel. Standbridge* v. *Zelker*, 514 F.2d 45, 52 (2d Cir.), *cert. denied*, 423 U.S. 872 (1975). As even the brief statement of facts in this brief demonstrates, the evidence of Braunig's guilt, independent of the search obtained materials, was overwhelming and any error attendant on the apartment search must be regarded as harmless. *E.g.*, *United States* v. *Murray*, 530 F.2d 856 (9th Cir. 1976); *United States* v. *Anderson*, *supra*; *United States* v. *West*, 486 F.2d 468, 473 (6th Cir. 1973), *cert. denied*, 416 U.S. 955 (1974).

As shown in the statement of facts, there was overwhelming proof against Braunig, independent of the apartment search evidence, on all of the counts on which she was convicted.* In any event, even assuming

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* For example, on the perjury count against Braunig (Count 15), the only item secured during the apartment search that added a new (as opposed to merely cumulative) dimension to the proof against her was the notation which she placed on the Government's bill of particulars reading "There was *no* perjurious intent except possibly re tel. and mail (name change) and that was evasion not perjury" (GX 499). When this small shred of evidence (which, indeed, could well have been viewed as exculpatory in nature) is contrasted with the other independent and abundant proof against her on that count, any error in its admission clearly is rendered harmless. Apart from the proof of Braunig's lies that are outlined in the statement of facts, namely, the testimony and exhibits produced by Mrs. Wynne of Actor's Equity Association which conclusively demonstrated the falsity of the defendant's testimony concerning her change of name to "S. M. Gardner;" the testimony of two officers of Manufacturers Hanover Trust Company and the exhibits which they produced (GX 202-204) and which forthrightly contradicted Braunig's testimony concerning the circumstances surrounding the opening of the "only" S. M. Gardner bank account; and the testimony of the other

[Footnote continued on following page]

arguendo that the apartment search evidence was erroneously admitted and that its admission harmfully infected several of the counts, under no fair reading of the evidence can it be said that this proof affected all of the counts (as to some of which, such as the perjury count, it was very largely irrelevant). Since Braunig received concurrent two year sentences on all counts, if the conviction on any one of the counts stands, the concurrent sentence doctrine should render further inquiry unnecessary. See *Barnes* v. *United States*, *supra*, 412 U.S. at 848 n.16; *Hirabayshi* v. *United States*, *supra*; *United States* v. *Neville*, 516 F.2d 1302, 1307 n.6 (8th Cir. 1975), *cert. denied*, 423 U.S. 925 U.S. (1976); *United States* v. *LeVecchia*, *supra*, 513 F.2d at 1219; *United States* v. *Keller*, 512 F.2d 182, 185 n.8 (3d Cir. 1975).

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bank officials of other "S. M. Gardner" bank accounts, proving, contrary to Braunig's testimony, her knowledge of those accounts, the Government also introduced the testimony of Deborah Menendez that the defendant had said that Braunig was her stage name (Tr. 80) thus using the stage name falsehood in reverse; her partnership with Gardner in the "conglomerate" Penguin Products (GX 326); her use of all sorts of corporate names on the credit card applications; the Ekalb account which she and Gardner opened at Barclay's Bank (GX 267 and 268), as well as numerous other bricks of circumstantial evidence, all of which overwhelmingly demonstrated that Susan Braunig had perjured herself before the Grand Jury. "The case against [Braunig on Count 15] was not woven from circumstantial evidence." *Harrington* v. *California*, *supra*. Rather, the proof of her perjury was so overwhelmingly that the "minds of the average jury" could not have found the proof significantly less persuasive had Braunig's notation on the Bill of Particulars been excluded.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

EUGENE NEAL KAPLAN, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 17th day of JANUARY, 1977 he served a copy of the within BRIEF (2 COPIES) by placing the same in a properly postpaid franked envelope addressed:

① Howard L. Jacobs, P.C., 401 Broadway, New York, N.Y. 10013;

② Donald Nawi, Esq., 29 Island [redacted] Drive, New Rochelle, N.Y.

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Eugene Neal Kaplan

Sworn to before me this
17th day of JANUARY, 1977

Lawrence Farkash

LAWRENCE FARKASH
Notary Public, New York State
No. 24-4606580
Qualified in Kings County
Comm. Expires March 30, 1977